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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 307

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY,

Appellants,

vs.

CITY OF LOS ANGELES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS.

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he Court reiterates its expression of a
thorough and able preparation, present
by both sides in this case.

y 25, 1960.

PHILIP H. RICHARDS
Judge of the Superior

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CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY,

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CITY OF LOS ANGELES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS.

The appellee, City of Los Angeles, a municipal corporation, hereby moves to dismiss the appeal heretofore filed with this Honorable Court by Consolidated Rock Products Company and Valley Real Estate Company. Such motion is based upon the following grounds:

1. The judgment appealed from rests upon an adequate non-federal basis.

2. The appeal does not present a substantial federal question.

The Jurisdictional Statement filed by appellants herein wholly omits from its summation of facts sev-

eral very important facts which omissions it is necessary to indicate and correct before we can properly discuss and elaborate upon each of our above mentioned grounds in support of our Motion to Dismiss.

Statement of Facts.

The following statement of facts is based upon the factual statement of the California Supreme Court, as set forth in its opinion (*Consolidated Rock Products Company, etc., et al. v. City of Los Angeles*, 57 A. C. Rep. 557; 370 P. 2d 342—Appendix A of appellants' Jurisdictional Statement). The facts stated therein were essentially a reiteration of the findings of fact and Memorandum Decision of the trial court (Appendix C of appellants' Jurisdictional Statement) and of the factual summation of the District Court of Appeal, Second Appellate District (15 Cal. Rptr. 775—Appendix B of appellants' Jurisdictional Statement). For the convenience of this Honorable Court, references to portions of the Memorandum Decision of the trial court, of the decision of the District Court of Appeal and of the decision of the California Supreme Court will be made by referring to the appropriate appendix and page number within the appellants' Jurisdictional Statement wherein those decisions are set forth.

The present controversy arose when appellants requested the City of Los Angeles to amend its zoning laws so as to permit them to conduct rock and gravel extraction operations upon the subject property in addition to the already permitted agricultural uses, which request was denied. Appellants then instituted the present action seeking to have the city's zoning ordinance declared invalid and to enjoin the enforce-

ment thereof insofar as it prohibited them from conducting rock and gravel extraction operations upon the subject property. Both the trial court and the California Supreme Court ruled against appellants and upheld the constitutionality of the applicable zoning regulations.

The subject property consists of approximately 348 acres of land owned by appellant Valley Real Estate Company and leased to the appellant Consolidated Rock Products Company. The subject property lies upstream from Hansen Dam in the San Fernando Valley portion of the City of Los Angeles and is in the center of what is commonly known as the Tujunga Wash (App. A, p. 1a). Such property is about two miles long in a generally east-west direction and is divided approximately in the middle by Foothill Boulevard running at that point in a generally north-south direction. The Tujunga Wash is bounded on its northerly side by the base of mountains and on its southerly side by bluffs of low hills, except for relatively narrow plateaus which overlook it from both sides (App. A, p. 1a).

The subject property is zoned to permit primarily agricultural uses including the raising of animals (App. A, pp. 2a and 15a). The limited rock and gravel extraction operations which had previously been conducted upon a small portion of the subject property as a nonconforming use had been *voluntarily terminated* in about 1935 (App. A, p. 19a) and had *not* been terminated by reason of the institution of the 1939 condemnation proceedings for the adjacent Hansen Dam debris basin by the Los Angeles County Flood Control District as intimated by appellants (Jur. St. pp. 5 and 6).

Hansen Dam and its debris basin and recreation area lie to the west of the subject property at the mouth of the Tujunga Canyon. Although appellants point out that other extraction "operations are presently conducted on other land adjoining the subject property" (Jur. St. p. 7), they *fail* to point out that such other operations are limited to a relatively small 125 acre parcel of land on the south side of the *westerly* portion of the subject property (and thus far removed from the adjoining communities), that such 125 acre parcel is not in the center of the wash like the subject property but is in a side pocket formed by the hills and thus its dust is less subject to being stirred and carried by the winds in the Tujunga Wash, that such operations have been conducted since 1931, that such property is substantially depleted and has a doubtful number of remaining years of operation left, that all other rock and gravel operations in the Tujunga Wash have been confined to the area *downstream* from Hansen Dam and that the City of Los Angeles since 1946 has not granted any new rock and gravel districts *upstream* from Hansen Dam (wherein lies the subject property) but, on the contrary, has specifically denied the application for the creation of a new rock and gravel district upon other premises upstream from Hansen Dam immediately adjacent to the subject property (App. A, pp. 2a and 17a).

The twin residential communities of Sunland and Tujunga adjoin the subject property, the more heavily developed portions of those communities lying easterly and southeasterly of the subject property. Appellants have again failed to mention, however, the further fact that in recent years the trend of development of these

communities has been in a westerly direction toward the subject property and along and upon the bluffs northerly and southerly thereof (App. A, p. 2a).

The California Supreme Court in its opinion specifically noted the findings of the trial court (App. A, pp. 3a and 4a) that "the Sunland-Tujunga area has a national reputation as a haven for sufferers from respiratory ailments" (mentioned by appellants); that such area "is inhabited by many such sufferers" (not mentioned by appellants); that "a considerable portion of its economy is based upon such reputation" (not mentioned by appellants); that "a rock and gravel operation upon the subject property could adversely affect the reputation of the Sunland-Tujunga area as a haven for sufferers from respiratory ailments" (mentioned by appellants); and that "There was substantial evidence that even though operated with all possible safeguards, the extraction of sand and gravel from the subject property would still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of Sunland and Tujunga; that this dust would have a damaging effect upon the sufferers from respiratory ailments; and also that such operations would adversely affect property values in those communities" (not mentioned by appellants).

The trial judge, after hearing all the evidence and after personally viewing the premises and the surrounding area first expressed his *own* view that, if strictly regulated, rock and gravel operations could be conducted upon the subject property with minimal detrimental effect upon the adjoining areas, but then *specif-*

ically found that "reasonable minds might differ and have differed" upon the various factors leading to such a conclusion (App. A. p. 3a) and therefore refused to substitute his own personal opinion for that of the city legislative body and upheld the refusal of the city to rezone the subject property so as to permit rock and gravel extraction operations thereon (App. A. p. 17a).

Although appellants have gone to great lengths in their Jurisdictional Statement to suggest to this Court that the City of Los Angeles was somehow attempting to misuse its zoning authority to preserve the subject property as a "park" or "natural preserve" or "retarding basin" in conjunction with Hansen Dam (Jur. St. pp. 13 and 24) one need only to read the pleadings, the briefs and the decisions of the state courts in this matter to see that this is a desperation attempt to create a false issue. Such an issue was never seriously urged by appellants in the state courts nor did those courts ever find any necessity to discuss or pass upon such a contention. The basic questions *actually* raised, discussed and answered in the trial and appellate courts below were the following:

1. Is the doctrine that where reasonable minds may differ as to the propriety or necessity for particular legislation, the court will not substitute its judgment for that of the legislative body, applicable in testing the validity of zoning legislation which prohibits operations for the extraction of rock and gravel from land

which allegedly has no other economic value? (App. A. p. 7a.)

2. Was there substantial evidence presented including the possible adverse effect of rock and gravel operations conducted on the subject property upon the health and welfare of the adjoining communities, to support the legislative determination as to the necessity, propriety and reasonableness of retaining the subject property in the agricultural zone and refusing to permit rock and gravel extraction operations thereon? (App. A. pp. 9a and 17a.)

3. Was there such a difference between the proposed rock and gravel operation on the subject property and that being conducted on an adjacent parcel of property as to refute the allegations of discrimination? (App. A. pp. 2a and 17a to 19a.)

4. Do the ordinances which have applied and which now apply to the subject property prohibit rock and gravel operations thereon (or do they, as contended by appellants, by a series of exemptions explicitly permit such operations thereon)? (App. A. pp. 19a and 20a.)

The California trial court and Supreme Court determined, and we submit correctly so, that the answer to each of the above questions was "yes".

I.

The Judgment Appealed From Rests Upon an Adequate Non-Federal Basis.

Appellants herein have stated the two questions which they present to this Honorable Court (Jur. St. p. 5) as:

> "1. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation therefor in violation of the Due Process Clause of the Fourteenth Amendment?
>
> "2. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable, where that use will not adversely affect the health, safety or welfare of other persons or property, constitute arbitrary and unreasonable exercises of the state police power in violation of the Due Process Clause of the Fourteenth Amendment?"

With respect to the first question, such question erroneously assumes that the Los Angeles zoning ordinances which place the subject property in an agricultural zone "altogether destroy the worth of valuable land". Appellants forget that the trial court went to great lengths to point out that because of its location in an occasionally active wash, the land in question had no other "economic" value than for rock and gravel quarrying but specifically negated appellants' allegations that it had no other value at all (App. C. pp. 39a and 40a). The California Supreme Court likewise recognized this distinction and recognized that the sub-

ject property could be put to some use and had some value, although "relatively small if not minimal," other than for rock and gravel operations (App. A, pp. 14a and 15a).

With respect to the second question posed by appellants, it not only contains the erroneous statement of the first question as discussed above, but it further erroneously assumes that the proposed rock and gravel extraction operation "will not adversely affect the health, safety or welfare of other persons or property." Appellants pose such question with apparent disregard for the California Supreme Court declarations that "There was substantial evidence that even though operated with all possible safeguards, the extraction of sand and gravel from the subject property would still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of Sunland and Tujunga; that this dust would have a damaging effect upon the sufferers from respiratory ailments; and also that such operations would adversely affect property values in those communities" (App. A, p. 4a) and that "having found on substantial evidence that the necessity and propriety of the legislative action in this case is one upon which reasonable minds may differ, the trial court properly found in favor of the ordinance's constitutionality." (App. A, p. 17a).

Thus it can be seen that the appellants' claim of the denial to them of certain federal constitutional rights is based upon their own erroneous assumptions of the facts involved.

As was stated in *Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051, a federal question

resting on false assumptions is without merit and affords no basis for review by the United States Supreme Court.

We submit that in any event the opinion of the California Supreme Court on those non-federal factual questions discussed above renders unnecessary a specific determination upon the federal questions urged herein by appellants and provides an adequate non-federal basis upon which the judgment of the California Supreme Court may be sustained.

The well settled law in this country is that the validity of legislation must be determined by the application to the facts of the so-called "reasonable minds" test. This was stated by the United States Supreme Court in the early and leading zoning case of *Euclid v. Ambler Realty Company*, 272 U. S. 365 (47 S. Ct. 114, 71 L. Ed. 303) at page 388:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

This thought was reiterated in *Sproles v. Binford*, 286 U. S. 374 (52 S. Ct. 581; 76 L. Ed. 1167), where it was stated at page 388 that:

> ". . . debatable questions as to reasonableness are not for the courts but for the legislature."

This principle has been echoed and followed by state courts throughout the nation in hundreds of zoning decisions since those early declarations, including the California courts (*Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 461, 202 P. 2d 38, Petition for Writ of Certiorari to the Supreme Court of California denied—337 U. S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Miller*

v. Board of Public Works, 195 Cal. 477, 490, 234 Pac. 381, appeal dismissed—273 U. S. 781, 47 S. Ct. 460, 71 L. Ed. 889; *Robinson v. City of Los Angeles*, 146 Cal. App. 2d 810, 815, 304 P. 2d 814).

Whether the facts in the present case were such that reasonable minds might differ as to the necessity and propriety and reasonableness of the agricultural zoning of the subject property was purely a factual determination which was thoroughly argued and considered and ruled upon by the state courts in the instant case (App. A, p. 17a) and was, we submit, determinative of the case.

The fact that, as appellants contend, the prohibition of the extraction of rock and gravel from the subject property destroys the "economic" value thereof is not determinative. No one contends that rock and gravel operations would not be the most profitable use to which appellants could put the land. As the California Supreme Court pointed out, however, such land has use and value for other purposes, albeit "relatively small" (App. A, p. 15a). In a similar case this court stated in *Goldblatt v. Town of Hempstead*, 369 U. S. 590, involving the validity of an ordinance prohibiting dredging below a certain depth:

> "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."

Legislative restrictions to protect the public health and safety were approved in *Mugler v. Kansas*, 123 U. S. 623 (8 S. Ct. 273, 31 L. Ed. 205), wherein it was stated at pages 668 and 669:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition, that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

It can readily be seen that the subject property, located as it is in an active wash, can be reasonably zoned only for agricultural purposes and not at all for residential, or commercial or manufacturing purposes. At least it has *some* value for uses permitted in that zone, although "relatively small." It would probably have *no* value at all for uses permitted in the other three primary zones. It is apparent that appellants' difficulty arises, not from the *zoning* of the subject property, but from the marginal nature and physical characteristics of the land itself. We submit that the law does not require, as appellants contend, that they

be rewarded for having acquired land of the most marginal sort by thereby being permitted to conduct their extraction operation thereon irrespective of its effect upon the adjoining communities and their inhabitants.

The law is clear that the United States Supreme Court will not take jurisdiction of a matter where the judgment of the state court could be supported upon an adequate non-federal ground. (*Stembridge v. State of Georgia*, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Buck v. People of the State of California*, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775; *Zorach v. Clauson*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954; *Hammerstein v. Superior Court of California*, 340 U. S. 622, 71 S. Ct. 521, 95 L. Ed. 586). It is submitted that adequate non-federal grounds exist in the instant case to support the judgment of the California Supreme Court and that this Honorable Court should therefore refuse jurisdiction of and dismiss this appeal.

II.

The Instant Appeal Does Not Present a Substantial Federal Question.

It is submitted that it is evident from a reading of the pleadings in the trial court, the briefs in the appellate court and the decisions of the trial and appellate courts that the within matter was tried and determined primarily upon the factual issues set forth in paragraph I, above, and that the questions involving the federal constitution urged by appellants herein were incidental to the determination of such factual issues. It is submitted that under such circumstances such questions should not be considered substantial federal ques-

tions upon which to base an appeal to this Honorable Court (*Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051; *Zucht v. King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194; *Valley Steamship Co. v. Wattawa*, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084; *United States Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876; *House v. Road Improvement District No. 2*, 266 U. S. 175, 45 S. Ct. 60, 69 L. Ed. 229).

Conclusion.

For each and every of the reasons set forth above it is respectfully submitted that the within appeal to this Honorable Court should be dismissed.

Respectfully submitted,

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